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No. 228

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN McSHAIN, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the district court (R. 38a-39a) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 3a-7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1958 (Pet. 8a). Petitioner's timely motion for rehearing was denied on June 10, 1958 (R. 120). The petition for certiorari was filed on July 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the documents exchanged by the parties constituted a contract.

STATUTES INVOLVED

The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.*, provides in pertinent part:[1]

> Sec. 2. * * * (c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> (1) determined to be necessary in the public interest during the period of a national emergency * * *
>
> * * * * *
>
> Sec. 3. Whenever advertising is required—
>
> (a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.
>
> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid,

[1] Since this case arose, the act has been recodified, with minor changes, as 10 U.S.C. 2301, *et seq.* (Supp. IV).

conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided, That all bids may* be rejected when the agency head determines that it is in the public interest so to do.

31 U.S.C. 74 (42 Stat. 24, as amended) provides in pertinent part:

* * * * *

Disbursing officers, or the head of any executive department, * * * may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

STATEMENT

The Government brought this action against petitioner for damages for refusal to perform a contract to construct a building (R. 2a-3a). Petitioner answered that no contract had been consummated (R. 19a). At the trial the Government introduced the following three documents as proof of the contract:

The Request for Proposals (Exh. A, R. 42a). The Government issued to the petitioner and other builders a "Request for Proposals" containing detailed specifications for the proposed project and providing (R. 43a):

1. Proposals in duplicate will be received until * * * 2 October 1951, for the purpose of negotiating a construction contract for * * * the above-described project * * *.

2. Proposals will be submitted in sealed envelopes upon the attached Form * * *. The proposer who is awarded the Contract will be required to execute the Department of the Army Contract Form for construction (R-5701) * * *.

3. The right is reserved, as the interest of the Government may require, to reject any and all proposals and to negotiate with any proposer.

The Contractor's Proposal (Exh. B, R. 60a-64a). In response to the Request the petitioner submitted, on the form supplied by the Government, a proposal stating:

> In compliance with your Request for Proposals * * * the undersigned hereby proposes to * * * perform all work for the above described project * * * for the consideration of * * * $6,574,825.00. * * * and agrees, upon receipt of written notice of an award of the contract within thirty days after the date of opening of the proposal, that he will execute contract Form No. R-5701 in accordance with the proposal as accepted * * *.
>
> The bidder further agrees that, if awarded the contract, he will commence the work within 10 calendar days after receipt of written notice to proceed * * *.
>
> * * * * * *
>
> Condition: Bidders are advised that the award for this work will be made to one Bidder on Proposal Nos. 1 and 2. The right is reserved, as the interest of the Government may require, to accept or re-[ject] any or all items of any proposal.
>
> [Signature.]

Notice of Award and Notice to Proceed (Exh. C, R. 64a). In response to this Proposal, the Government wrote petitioner as follows:

> You are hereby notified that your proposal dated 2 October 1951, in the total amount of $6,574,825.00 for Proposals Nos. 1 and 2 is accepted * * *. This is your formal notice to proceed with the work under the contract. * * *

Nonperformance having been admitted by the answer and the issue of damages having been reserved for a separate trial, the Government rested its case. Petitioner thereupon moved to dismiss the action for failure to establish a prima facie case, contending that its "Contractor's Proposal" was not a firm offer. The district court granted the motion and dismissed the action with prejudice. The court of appeals unanimously reversed, finding in the documents "a text-book example of a contract" (Pet. 6a). It remanded the case to the district court to allow the petitioner to present its case.

ARGUMENT

This case presents an elementary question of contract law on which the decision below is clearly correct. There is no occasion for review by this Court.

1. The documents exchanged present, as the court of appeals said, "a text-book example of a contract." Petitioner contends, however, that § 2(c)(1) of the Armed Services Procurement Act of 1947, under which the contract was made, prohibited the Army from accepting the offer without first "haggling" for a better

price.[2] The contention is frivolous. In permitting certain contracts to be "negotiated * * * without advertising" (§ 2(c)), the act merely excepted such procurements from the restrictions imposed when "advertising is required" (§ 3). It created not a duty to "negotiate" but a freedom not to "advertise."[3]

2. Petitioner argues that the Government is bound by a prior decision of the Comptroller General that there was no contract. But even if the Comptroller General had authority to bind the executive department on a question of law (but see *Climatic Rainwear Co.* v. *United States*, 115 C. Cls. 520, 533), he did not exercise it. The letter (Pet. 34a-42a) does not purport to settle or adjust any claim, or even to decide finally whether there was a contract. Rather, in response to a request by the Secretary of the Army and on the basis of facts not yet introduced into evidence in this case, the Comptroller General simply advised the Secretary that "considering the ambiguities, uncertainties, and confusion which attended the entire transaction, there appears no clearly sound basis for concluding that a contract was consummated" (Pet. 41a). This was no more than advice to the Secretary that he would be justified in releasing the contractor from his bid and reletting the contract and that, if he decided to do so, his action

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[2] Even if it did, the requirement would be solely for the benefit of the Government—to assure the best price—and could not be invoked by the contractor. See *American Smelting & Refining Co.* v. *United States*, 259 U.S. 75; *United States* v. *New York & Porto Rico S. S. Co.* 239 U.S. 88.

[3] See 32 C.F.R. § 3.101: "negotiation means that method of procurement under which the procedures for procurement by formal advertising * * * are not required." Substantially the same definition was adopted in the 1956 revision and codification of the act: "'Negotiate' means make without formal advertising." 10 U.S.C. 2302(2) (Supp. V).

would not thereafter be questioned by the Comptroller General. Cf. 31 U.S.C. 74, *supra*, p. 3.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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